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In the Supreme Court of the United States

MILTONOUS KINGDOM,
PETITIONER

v.

A.A. LAMARQUE, Warden, and
ATTORNEY GENERAL OF CALIFORNIA,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did petitioner, whose lawyer failed to file a Federal petition for writ of habeas corpus within AEDPA's statute of limitations, establish "extraordinary circumstances" justifying equitable tolling of the limitations period?

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OPINIONS BELOW

The judgment of the United States District Court for the Northern District of California dismissing petitioner's petition for writ of habeas corpus was rendered on February 22, 2007 (Case No. CV-04-2342 PJH).(Appendix, A-5). The unpublished opinion of the Ninth Circuit Court of Appeals (Case No. 07-15549), was rendered on March 6, 2008. (Appendix, A-3); A Petition for Rehearing was denied on September 19, 2008. (Appendix, A-2).

JURISDICTION

The United States District Court for the Northern District of California had jurisdiction pursuant to Title 28 U.S.C. Section 2254. The Court of Appeals for the Ninth Circuit had jurisdiction pursuant to Title 28 U.S.C. Sections 1291 and 2253.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1) and pursuant to Rule 10(c) of the Supreme Court Rules in that the Court of Appeals for the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

On December 12, 2008, this Court granted petitioner's motion for an extension of time to file the foregoing Petition for Writ of Certiorari. Pursuant to this Court's Order, the instant petition is timely as it was filed on or before January 21, 2009. (Appendix, A-1).

STATUS OF THE PETITIONER

The petitioner remains incarcerated under the authority of the Attorney General and the California Department of Corrections, at the California State Prison (Sacramento), Represa, California, serving a sentence of life without the possibility of parole.

STATEMENT OF THE CASE

On May 20, 1998, petitioner Miltonous Kingdom was sentenced to life without parole. After direct appellate review of this conviction was concluded, Kingdom's counsel sought to exhaust petitioner's state court remedies, filing petitions in every level of the state court. Ten months after the California Supreme Court denied the state petition for writ of habeas corpus, on June 15, 2004 counsel filed a federal petition in the United States District Court, for the Northern District of California. Having apparently misplaced the petition, that court did not consider it for over two years, and then on September 26, 2006, asked the parties to brief the issue of timeliness.

On February 22, 2007, the District Court dismissed petitioner's federal petition for writ of habeas corpus, without consideration of its merits, based on a finding that it was not timely. Though each state petition had been accepted by the state courts, the federal court held that particularly lengthy gap periods between state court filings would not be statutorily tolled, and further found that petitioner was not entitled to equitable tolling of the Anti-terrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations.

The court held that whether misconduct on the part of petitioner's counsel constituted an "extraordinary circumstance" justifying equitable tolling was a "close call," explaining: "[t]he fact that [counsel] was retained for nearly four years prior to filing the petition, and at least eight months prior to the expiration of AEDPA's statute of limitations, without any evidence that he was actively pursuing Kingdom's case, suggests egregious behavior." (Appendix, A-8). The court held, however, that petitioner did not produce any evidence of his own reasonable diligence, as was also required in order to obtain equitable relief. (Appendix, A-9).

On March 6, 2008, this judgment was affirmed by the Ninth Circuit Court of Appeals. The appellate court's memorandum opinion held that "ordinary attorney negligence" does not constitute an extraordinary circumstance, and that "the record reflects that Kingdom did not pursue his rights diligently." (Appendix, A-4). The Ninth Circuit's decision is the judgment sought to be reviewed by this Court.¹

REQUEST TO DEFER CONSIDERATION OF PETITION

On November 26, 2008, after the Ninth Circuit's mandate issued, petitioner filed a motion pursuant to F.R.Civ.P. 60(b)(6) in the district court, seeking relief from the final judgment underlying the Court of Appeal's decision herein. In this motion

¹ Because the instant petition challenges only the Court's order finding petitioner's federal petition untimely and not subject to equitable tolling, we have not included the facts underlying petitioner's criminal conviction herein.

petitioner brought to light additional facts bearing upon the issue of whether he was entitled to equitable tolling of the AEDPA statute of limitations. The district court denied the motion on January 7, 2009, holding that the motion was untimely and that Rule 60(b)(6) was not the proper vehicle for presenting the additional facts relied upon. In so ruling, however, the court made substantive findings at variance with those underlying the present petition. Specifically, the court found that the evidence presented demonstrated that petitioner was diligent in pursuing habeas corpus relief through communications with his lawyer. At the same time, the court found that these communications showed greater involvement by the lawyer, who failed nonetheless to timely file a federal petition, making his conduct less than "egregious" for AEDPA tolling purposes.

Petitioner has filed a notice of appeal from the district court's denial of the Rule 60(b)(6) motion, and the court has issued a certificate of appealability. The Ninth Circuit's disposition of this appeal, in light of the new findings of the district court, might cause the Ninth Circuit to alter or modify the judgment now under review. Accordingly, we have filed, concurrently with this petition, a motion to defer consideration of the petition pending the Ninth Circuit's disposition of the appeal.

ARGUMENT

I. Petitioner Established Both Extraordinary Circumstances and Personal Diligence in Seeking Federal Habeas Relief; Thus Equitable Tolling of AEDPA's Limitations Period Was Appropriate.

Petitioner Kingdom's petition for writ of habeas corpus was dismissed, without consideration of its merits, by the United States District Court of the Northern District of California based on a finding that the petition was not submitted timely. The court held that petitioner was not entitled to equitable tolling of AEDPA's limitations period because he had not established that his attorney's conduct constituted an "extraordinary circumstance" warranting relief. The Ninth, Second and Third Circuits have held that an attorney's egregious misconduct may qualify as an extraordinary circumstance justifying such relief, but the question of what sort of attorney conduct will rise to this level remains unclear. Petitioner respectfully asks this Court to consider the petition to settle this important question of federal law. We submit that whether judged under a standard of "gross negligence" or "egregious attorney misconduct," counsel's behavior in the instant case constituted an extraordinary circumstance justifying equitable relief, and the Ninth Circuit erred in holding otherwise.

In California, a state court decision ordinarily becomes "final" 90 days after the California Supreme Court has denied review. The AEDPA statute of limitations for the filing of a federal petition for writ

of habeas corpus expires one year after the state decision becomes final. See *Miller v. Schiriro*, 2006 U.S. Dist. LEXIS 94824 (D. Ariz. 2006). This limitations period is statutorily tolled during periods in which a properly filed application for post-conviction relief is pending in the state courts. See 28 U.S.C. Section 2244(d)(2). Applying these rules in the instant case, the District Court found that petitioner's federal habeas petition was filed at least 914 days late.

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). In *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003), the Ninth Circuit explained: "where an attorney's misconduct is sufficiently egregious, it can constitute an "extraordinary circumstance" warranting equitable tolling of AEDPA's statute of limitations." *Id.* at 800. The Ninth Circuit thus joined the Second and Third Circuits in holding that counsel's conduct may qualify as an extraordinary circumstance, affording a basis for equitable relief as long as the petitioner can also show that he had been personally diligent in pursuing the federal writ. See *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) and *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001). The question in equitable tolling cases based on attorney misconduct is always whether "an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the Court may deem equitable tolling appropriate." *Ford v. Hubbard*, 330 F.3d 1086, 1106 (9th Cir.

2003), vacated on other grounds sub nom., *Pliler v. Ford*, 542 U.S. 225 (2004).

In *Spitsyn, supra*, the Ninth Circuit found that though hired nearly a full year before the federal petition was due, counsel completely failed to prepare and file the petition. The petitioner and his family contacted the attorney numerous times seeking action, but their efforts were “fruitless.” Despite Spitsyn’s request for the return of his case files, counsel failed to do so until two months after the limitations period had elapsed. The Court stated “[t]hat conduct was so deficient as to distinguish it from. . .” merely negligent performance of counsel. 345 F.3d 796, at 801. After concluding that counsel’s misconduct constituted an “extraordinary circumstance,” the Court remanded the case to the District Court for further consideration of whether Spitsyn exercised reasonable diligence in pursuing the matter.

In *Baldyague, supra*, the Second Circuit considered a case in which counsel failed to file a timely petition for habeas relief, having been specifically directed by his client’s representatives to do so. Erroneously believing that the AEDPA statute of limitations had already expired, the attorney filed a frivolous motion for immediate deportation, instead. The Court held:

Weinstein’s actions were far enough outside the range of behavior that could reasonably be expected by a client that they may be considered “extraordinary We hold that an attorney’s conduct, if it is sufficiently egregious, may constitute the kind of “extraordinary

circumstances" that would justify the application of equitable tolling to the 1-year limitations period of AEDPA.

338 F.3d at 152-153. And in *Nara v. Frank*, *supra*, the petitioner's attorney failed to accurately inform him of the state supreme court's denial of review, refused to remove herself from the case, led him to believe that she would file a federal habeas petition on his behalf, and erroneously informed him that there were no time constraints for the filing of a federal petition. The Third Circuit, in remanding the case, held that Nara's allegations, if true, may justify equitable tolling. 264 F.3d 310 at 320.

Finally, in *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1977)², the Ninth Circuit held that the fact that the petitioner's attorney moved out of state, was a circumstance over which the petitioner had no control, justifying the equitable tolling of the limitations period. In that case, petitioner's attorney left his work product for a successor attorney, but it was no use to him. Though *Beeler* was a death penalty case, the finding that counsel's move out of state was a circumstances over which the petitioner had no control, and which should be considered as an equitable factor, is equally true here.

Considering *Spitsyn*, *Baldayaque*, *Nara* and *Beeler*, the conduct of petitioner Kingdom's counsel constituted an extraordinary circumstance, warranting tolling of the statute of limitations.

² *Beeler* was overruled on other grounds in *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998)(en banc).

Petitioner had been sentenced to life without the possibility of parole. In March of 2000, he hired attorney Charles Gretsche for the sole purpose of seeking habeas relief. As in *Spitsyn*, counsel was hired nearly a full year before the AEDPA statute of limitations was set to run. Counsel failed to timely file any document. By the District Court's calculation, AEDPA's filing deadline expired before counsel exhausted petitioner's claims in the state court.

In explaining his deficient performance, Counsel offered to the court an extensive list of personal and professional hardships that counsel had suffered during the period of petitioner's representation, which caused him to neglect petitioner's case.³ Among these was the fact that counsel's father suffered an illness necessitated counsel's relocation out of state. Prior to filing in the federal court, counsel relocated from California to Washington State, without notice to petitioner, and took petitioner's file with him. As argued by counsel, though he did not completely abandon petitioner (by failing to file any federal petition at all), his conduct was "egregious," constituting an extraordinary circumstance because filing in the federal court 914

³ Counsel specifically set forth the following hardships which contributed to his failure to file the federal and state petitions timely: (1) counsel's wife (also an attorney) was charged with contempt of court, was being sued by former clients, and was facing a jail sentence which required counsel's attention; (2) counsel tried six back-to-back murder trials during the relevant period; (3) counsel's own illness, as well as his child's illness, required attention; (4) counsel moved to Washington State to be near his ailing father. For a variety of reasons this caused a delay of several months before office records were accessible to counsel, while counsel was dealing with his father's health.

days late was tantamount to a complete failure to file, under the circumstances.

The Ninth Circuit did not explain what critical difference exists between petitioner's case and *Spitsyn, supra.*, in which counsel's conduct was found to constitute an "extraordinary circumstance." The Court simply cited *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001), in support of its conclusion that "ordinary attorney negligence" is inadequate to justify relief. In *Frye* the Court held that counsel's error in filing the federal petition 78 days late (after accounting for statutory tolling) did not constitute extraordinary circumstances warranting equitable tolling. This brief pre-*Spitsyn* opinion did not examine the extent of counsel's misconduct, or the extent to which the client exhibited diligence. These additional factors were considered "extraordinary" in the cases of *Spitsyn*, *Nara* and *Baldayaque*. Here, counsel's conduct went beyond "ordinary" negligence, when pressed by other personal and professional demands, he missed AEDPA's filing deadline by nearly two and one half years. Such a monumental failure was sufficiently "egregious" to constitute an extraordinary circumstance warranting equitable relief.

Petitioner Kingdom was also personally diligent in seeking to have his habeas petition considered by the federal court. Counsel was hired very early to seek collateral review. Counsel informed Kingdom and his family, and they reasonably and in good faith believed, that the case was proceeding smoothly. Their belief was confirmed by the fact that state petitions had been filed in the state courts, throughout this period, and none had been denied as untimely. These petitions are necessary precursors to any petition filed in the

federal court. Petitioner was not aware of the extensive difficulties counsel was facing, personally and professionally, and was in no way responsible for counsel's late filing. Petitioner was not, nor could he reasonably have been expected to be, familiar with the complexities of the AEDPA, and had no reason to question that the case was moving forward as required.⁴

CONCLUSION

Based on the foregoing, petitioner Miltonous Kingdom respectfully prays the Court grant his Petition for Writ of Certiorari, to address the issues raised herein, and further requests that the case be remanded with appropriate instructions.

Date: January 15, 2009

Respectfully submitted,

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⁴ We note, for example, that the district court's 2007 Order found petitioner was not entitled to statutory tolling of lengthy gap periods, based on this Court's 2006 decision in *Evans v. Chavez*, 546 U.S. 189 (2006). That case was not even decided until after Kingdom's petition was filed in federal court, and long after his state petitions were considered in the California courts. Clearly, a matter as complicated as the statutory tolling of gap periods between state court habeas petitions is outside the ordinary understanding of a criminal defendant. Petitioner reasonably relied on counsel for such procedural decisions.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 12, 2008

Mr. William Lathan Osterhoudt
135 Belvedere St.
San Francisco, CA 94117

Re: Miltonous Kingdom
v. A.A. Lamarque, Warden, et. al.
Application No. 08A500

Dear Mr. Osterhoudt:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on December 12, 2008 extended the time to and including January 21, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk

by s/ Gail Johnson/[]
Gail Johnson
Case Analyst

FILED: Sep. 19, 2008
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILTONOUS KINGDOM,	)	No. 07-15549
)	
Petitioner - Appellant,	)	D.C. No. CV-04-
	)	02342-PJH
v.	)	Northern District
	)	of California,
A. A. LAMARQUE, Warden;	)	San Francisco
et al.,)	
Respondents - Appellees.	)	ORDER
<hr/>		

Before: BEEZER, FERNANDEZ, and McKEOWN,
Circuit Judges.

The panel has voted to deny the petition for
panel rehearing.

The full court has been advised of the petition
for rehearing en banc and no judge has requested a
vote on whether to rehear the matter en banc. See
Fed. R. App. P. 35.

The petition for panel rehearing and the
petition for rehearing en banc are denied.

KR/Research

FILED: Mar 06, 2008
Molly Dwyer, Acting Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MILTONOUS KINGDOM,	) No. 07-15549
)
Petitioner - Appellant,	) D.C. No. CV- 04-
	) 02342-PJH
v.)
)
A. A. LAMARQUE, Warden;	) MEMORANDUM*
et al.,)
Respondents -Appellees.))
_____)

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted February 26, 2008**

Before: BEEZER, FERNANDEZ and McKEOWN,
Circuit Judges.

*This disposition is not appropriate for publication and is not
precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision
without oral argument. See Fed. R. App. P. 34(a)(2).

California prisoner Miltonous Kingdom appeals from the district court's judgment dismissing as untimely his 28 U.S.C. § 2254 petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We review de novo, *Brambles v. Duncan*, 412 F.3d 1066, 1069 (9th Cir. 2005), and we affirm.

Kingdom contends that he is entitled to equitable tolling because his attorney's misconduct in failing to file a timely petition constituted extraordinary circumstances beyond his control. This contention fails because ordinary attorney negligence does not constitute an extraordinary circumstance sufficient to warrant equitable tolling. See *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001); cf. *Spitsyn v. Moore*, 345 F.3d 796, 800-802 (9th Cir. 2003). Furthermore, we agree with the district court that the record reflects that Kingdom did not pursue his rights diligently. See *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MILTONOUS KINGDOM,

Petitioner,

No. C 04-2342 PJH

v.

A.A. LAMERQUE,

Respondent.

**ORDER
GRANTING
MOTION TO
DISMISS**

Petitioner Miltonous Kingdom ("Kingdom") is a California prisoner currently incarcerated at Folsom State Prison, who filed the instant federal habeas petition on June 15, 2004. On September 26, 2006, this court issued an order for further briefing regarding the timeliness of Kingdom's federal petition because it appeared to the court that Kingdom's petition was filed at least 549 days late. In response to the court's order, the state filed a motion to dismiss, which Kingdom opposed, and the state then filed a reply.

In addition to the 549 days already noted by the court, the state correctly notes in its motion to dismiss that an additional 365 days were not tolled between the time that the state superior court denied Kingdom's state habeas petition on May 10, 2001, and Kingdom filed another state habeas petition with the California Court of Appeal on April 26, 2002. See *Evans v. Chavis*, 546 U.S. 189 (2006);

see also *Delhomme v. Ramirez*, 340 F.3d 817, 821 (9th Cir. 2003).⁵ Accordingly, Kingdom's federal habeas petition was filed at least 914 days, or more than 2.5 years late. In other words, AEDPA required Kingdom to file his federal habeas petition no later than December 12, 2001.

Kingdom does not dispute that the instant petition was at least 914 days late. Instead, Kingdom's counsel, Charles Gretsches, argues that Kingdom is entitled to equitable tolling based on Gretsches's egregious conduct in filing the petition. Gretsches asserts that he was retained by Kingdom's family in late March or early April 2000, approximately 8 months prior to the expiration of AEDPA's statute of limitations. Gretsches then details a list of his other professional and personal commitments that prevented him from filing a timely federal habeas petition. The commitments and conflicts included the trials of six murder cases; Gretsches's wife, Maurcen Kallins' legal problems, which Gretsches asserts required him to assist with her defense; Gretsches's parental obligations; Gretsches's 59th birthday; residential and work-related moves; Gretsches's father's hospitalization; and Gretsches's repairs to his father's house. Gretsches argues that his egregious conduct constitutes extraordinary circumstances entitling Kingdom to equitable tolling,

⁵ The state also asserts that the period between the time the state court of appeal denied Kingdom's habeas petition on June 5, 2002, until October 21, 2002, approximately 138 days when Kingdom filed a habeas petition with the California Supreme Court, is also untolled. This, however, is a closer call in terms of the gap between Kingdom's petitions; and the court, therefore, has not assumed for purposes of this motion, that those 138 days were untolled. See *id.*

such that Kingdom's federal habeas petition, at least 914 days late, should be considered timely.

AEDPA's one-year statute of limitations may be equitably tolled if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted). Equitable tolling is justified in few cases, and "the threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule." *Id.* It is the petitioner's burden to show that he is entitled to such tolling, and the determination is a "fact-specific inquiry."

The first question for the court is whether or not Gretsches conduct constitutes extraordinary circumstances. *Id.* at 801-02. If the court concludes that it does, then the second inquiry is whether, in addition to the existence of extraordinary circumstances based on his counsel's conduct, Kingdom can demonstrate that he personally exercised reasonable diligence in pursuing his federal habeas petition. *See id.* (directing district court to consider on remand the separate question of whether petitioner exercised reasonable diligence).

Ordinary attorney negligence, such as the miscalculation of the statute of limitations deadline, the provision of misinformation regarding the deadline, and/or simple delay, will not constitute extraordinary circumstances. *Id.* at 800 (citations omitted). However, "where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary circumstance' warranting equitable tolling." *Id.*

In *Spitsyn*, the Ninth Circuit held that the conduct of the inmate's attorney was sufficiently egregious to justify equitable tolling of the one-year limitation period. The attorney was hired nearly a full year in advance of the deadline, and he completely failed to prepare and file a petition. *Id.* at 798-99. The inmate, in addition to his family members, contacted the attorney numerous times, by telephone and in writing, but the efforts were fruitless. *Id.* Despite a request that the attorney return the inmate's file, the attorney retained it for the duration of the limitations period and more than two months beyond. *Id.* The court held that the *Spitsyn* attorney's conduct was so deficient as to distinguish it from the merely negligent performance of counsel. *Id.* at 801-02. After concluding that the attorney's conduct constituted "extraordinary circumstances," the *Spitsyn* court then remanded the case to the district court to determine "whether *Spitsyn* [himself] exercised reasonable diligence." *Id.* at 800, 802.

Whether or not Gretsches conduct in this case may be considered "egregious," thus constituting "extraordinary circumstances," is a close call for the court. The fact that Gretsches was retained for nearly four years prior to filing the petition, and at least eight months prior to the expiration of AEDPA's statute of limitations, without any evidence that he was actively pursuing Kingdom's case, suggests egregious behavior. However, this case is missing a key element that existed in *Spitsyn*: evidence of Kingdom's own diligence and efforts in pursuing federal habeas relief. In *Spitsyn*, one of the factors that made the attorney's conduct particularly egregious was his failure to respond to the

petitioner's active efforts to pursue his case and the petitioner's pleas for the return of his file. Here, there is absolutely no evidence of diligence on Kingdom's part, an essential requirement in order for this court to conclude that he is entitled to equitable tolling.

Because the court finds that Kingdom has not established that he exercised reasonable diligence in pursuing his federal habeas petition, which was filed at least 914 days late, the court GRANTS the state's motion to dismiss.

The clerk shall close the file.

Dated: February 22, 2007

IT IS SO ORDERED.

s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District
Judge